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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-6868

77-6868

DONALD GENE RUNYAN,

Appellant.

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

MOTION TO DISMISS OR AFFIRM

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The appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of California on the grounds that it is manifest that the judgment is not final, no state statute was upheld against a claim that it was repugnant to the federal Constitution, and the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

I.

THE STATUTES INVOLVED AND THE NATURE OF THE CASE

A. Statutes

This appeal raises the question of whether the right to a fair trial, due process or effective assistance of counsel requires that a pretrial deposition of a material witness for purposes of discovery be ordered upon defendant's request where defendant alleges unconsciousness at the time of the crime.

In the court below, appellant urged that the

court order the deposition pursuant to its inherent power of rule-making to ensure a fair trial and procedural due process. The court acknowledged that it would exercise such power where necessary to preserve constitutional rights but where no such right was involved, as here, it would not engage in rule-making where the Legislature had already established the applicable procedural rules. The statutes involved were California Penal Code sections 1335-1341.

Penal Code sections 1335-1341 provide that where the trial court finds that a material witness for the defendant or People is about to leave the state or is so sick or infirm as to afford reasonable grounds for apprehension that he will be unable to attend trial, the deposition must take place. However, if the trial court does not find such ground to exist, the deposition cannot take place.

B. The Nature of the Case

On March 3, 1975, the Pasadena City Prosecutor filed a complaint charging appellant with three misdemeanor violations alleged to have occurred on or about March 2, 1975: Driving under the influence of alcohol, a violation of Vehicle Code section 23102(a); obstructing a peace officer in the performance of his duty, a violation of Penal Code section 148; and vandalism, a violation of Penal Code section 594(a).

A pretrial motion for discovery was made on April 1, 1975, in Pasadena Municipal Court, which motion sought: (1) All information in the possession of the Pasadena City Prosecutor relating to the charges against defendant; (2) the depositions of all officers involved in the charges; and (3) a subpoena duces tecum served on the Pasadena Chief of Police requiring him to produce copies of any and all complaints made against the officers involved in this case for brutality

or untruthfulness and any and all fitness reports relating to their propensities for brutality and truthfulness.

The Pasadena City Prosecutor did not oppose discovery of Item No. 1 but did oppose discovery of Nos. 2 and 3. The appeal involving No. 3 has been abandoned. The entire motion was granted by the Pasadena Municipal Court.

The Pasadena City Prosecutor filed a motion to vacate the order granting discovery and to limit the discovery to No. 1.

Item No. 1, the entire file of the Pasadena City Prosecutor, together with the police report and the "rap sheet" of appellant, had already been supplied to the latter's attorney. The Pasadena City Prosecutor objected to the previous order granting discovery on the grounds that there had been no compliance with California Penal Code sections 1335 et seq., that the information sought was not relevant or material to the case and furthermore was inadmissible, and that there was no affidavit or declaration by appellant showing sufficient cause to allow such discovery. The motion was denied despite the fact that there was no showing that any of the officers were about to leave the state or were sick or otherwise unable to attend trial.

The Pasadena City Prosecutor then filed a Petition for Writ of Prohibition in Department 70 of the Superior Court for the County of Los Angeles. The petition asserted depositions may be taken conditionally only under the express provisions of California Penal Code sections 1335 et seq., and that appellant's order was improper as not coming within those provisions.

On June 10, 1975, the Honorable John W. Holmes, Judge of the Superior Court, denied the Pasadena City

Prosecutor's Petition for Writ of Prohibition and discharged the alternative writ.

On November 16, 1976, the Court of Appeal of the State of California, Second Appellate District, Division Four, affirmed the Superior Court's decision and denied a Petition for Rehearing on December 9, 1976.

Upon petition for hearing to the Supreme Court of California, the decision of the Court of Appeal of California was reversed over appellant's contention that the court order such deposition pursuant to its inherent rule-making power to ensure a fair trial and procedural due process.

II.

ARGUMENT

A. The Appeal Should be Dismissed Because the Judgment is Not Final

The instant case remains to date at the pretrial stage, the California Supreme Court having ruled the trial court's grant of the request for pretrial deposition improper. An appeal will not lie nor a petition for writ of certiorari be granted where judgment is not final. (28 U.S.C. § 1257.)

The denial of intermediate relief in a state criminal case is not a final judgment and, thus, in such instance the court will dismiss for lack of jurisdiction under 28 U.S.C. § 1257. In Wilson v. Schnettler (1961) 365 U.S. 381, 385, this Honorable Court noted that in a state criminal case, an adverse interlocutory order denying a motion to suppress evidence should not be reviewed until the state court has fully performed its duty. This is so because if there is adherence to such order resulting in prejudice, an appeal to the state court and petition for writ of certiorari would lie. (Id., at 385. In Arceneaux v. Louisiana (1964) 376 U.S. 336,

338, petitioner's request for a preliminary examination prior to a trial for vagrancy had been denied in the state courts. This Court found that denial of intermediate relief was not a final judgment within the meaning of 28 U.S.C. § 1257. (See also N.A.A.C.P. v. Williams (1958) 359 U.S. 550.) In the instant case, no appeal lies as a matter of right because this matter has not gone to trial. Dismissal, acquittal, and voluntary compliance with the discovery request are among the possibilities which would moot the issue. Therefore, the policy of requiring final judgment is applicable here, and this appeal should be dismissed.

B. The State Statutes Were Not Upheld Against a Claim of Repugnancy to the Federal Constitution

Appellant contended in the California Supreme Court that the right to a fair trial and to procedural due process required the court to exercise its inherent rule-making power to order depositions for discovery purposes in criminal prosecutions. Appellant states (Juris. Statement p. 7) that the California Supreme Court's opinion

> ". . . denying appellant's discovery motion was rendered notwithstanding appellant's contentions that such discovery was essential to ensuring effective counsel and was granted pursuant to a valid exercise of the trial court's inherent power to conduct a fair trial and ensure due process of law. . . ."

The court declined to exercise such power. The California Supreme Court acknowledged in its opinion that it would exercise such power where a constitutional right were at issue:

> ". . . As we explained in Reynolds, 'It is one thing for a court to prescribe judicial procedure necessary to protect some fundamental constitutional principle or to effectuate some specific constitutional guarantee of individual liberty. [Citations.] It is quite another thing for a court to design judicial procedures which are in no way required by higher law but which may seem to some socially desirable and perhaps may be permitted--at least to some extent--by our state and federal Constitutions.'. . ." (Original italics.) (People v. Municipal Court (Runyan) (1978) 20 Cal.3d 523, 532; see Appellant's App. A.)

The court observed that there was no constitutional foundation to the contention that the right to a fair trial mandated depositions for discovery purposes. (Ibid., at 530.)

The court very clearly distinguished its response to a request to exercise its inherent power where a constitutional right was involved from its exercise of such power in the absence of such a right. In this case, in the absence of a constitutional issue, it construed California Penal Code sections 1335-1341 as legislative action controlling the circumstances in which depositions could be obtained in criminal cases. The court held that it would not create rules where the Legislature had spoken.

It is clear then that the court did not uphold the validity of a state statute against a claim it was repugnant to the federal Constitution. Instead, the court was urged to exercise its inherent rule-making power to preserve an asserted

constitutional right. It acknowledged it would do so where a constitutional right was at stake. The court declined to impose a rule in this case because no constitutional right was in issue. It concluded that it would not otherwise employ such power where the Legislature had spoken, in this case by California Penal Code sections 1335-1341. Thus, because a state statute was not upheld against a claim of repugnancy to the federal Constitution, an appeal will not lie. (28 U.S.C. § 1257(2).)

It is essential to this Honorable Court's jurisdiction on appeal that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws. (Charleston Assn. v. Alderson (1944) 324 U.S. 182, 185.) The record must show that such contention was made below. (Live Oak Assn. v. R.R. Comm. (1925) 269 U.S. 354, 358-359.) In this case, both appellant in his jurisdictional statement and the California Supreme Court in its opinion define the issue to be whether the court should order depositions pursuant to its inherent power, not whether California Penal Code sections 1335-1341 were constitutional. This appeal should be dismissed because a state statute was not upheld against a claim of repugnancy to the Constitution.

C. No Substantial Federal Question is Involved in the Instant Appeal

It is clear that the denial of appellant's request for a pretrial deposition of the arresting officer for discovery purposes on grounds of appellant's unconsciousness at the time of arrest is not an infringement of a constitutional right to effective counsel, fair trial, or due process. Suppression of material evidence favorable to an accused is

a denial of due process justifying a new trial "irrespective of the good faith or bad faith of the prosecution." (Brady v. Maryland (1963) 373 U.S. 83, 87.) In the Brady case, the codefendant's extrajudicial statement in which the declarant admitted the actual homicide was not disclosed. This Court found this to be a denial of due process and violative of the Fourteenth Amendment. (Ibid., at 91.) It is equally well settled that the People must voluntarily provide material evidence which is exculpatory in nature. (United States v. Agurs (1975) 427 U.S. 97, 109-110.) This line of cases, of course, deals with disclosure of information by the People.

However, it is well settled that the government has no responsibility to call all witnesses who are competent to testify. (Washington v. United States (5th Cir. 1960) 275 F.2d 687, 690; see also Masciale v. United States (1958) 356 U.S. 386, 388.) A defendant is responsible to call witnesses, the testimony of whom he desires. (United States v. Grooms (7th Cir. 1972) 454 F.2d 1308, 1311, cert. den. (1972) 409 U.S. 858.)

A criminal defendant is entitled to access to any prospective witness although such a right of access may not lead to an actual interview. (United States v. Scott (6th Cir. 1975) 518 F.2d 261, 268.) There is a limitation in that a witness may refuse to be interviewed or may dictate circumstances under which he will submit to an interview. (United States v. Brown (5th Cir. 1977) 555 F.2d 407, 425, cert. den.(1978) ___ U.S. ___; Byrnes v. United States (9th Cir. 1964) 327 F.2d 825, 832, cert. den. (1964) 377 U.S. 970.) Such is not a denial of the right to a fair trial. (United States v. Brown supra, at 425.) Thus, no federal question of substance is raised by the instant case.

Where appellants have failed to raise any substantial federal question, an appeal will be dismissed. (Palmer Oil Corp. v. Amerac. Corp. (1952) 343 U.S. 390, 391.) Where a judgment rests on adequate state grounds, there is no substantial federal question. (Black v. Cutter Laboratories (1955) 351 U.S. 292, 298.) In the instant case, the California Supreme Court found no federal constitutional right to a deposition as a pretrial discovery device. This is consistent with the previously cited federal cases which have found a right under the Due Process Clause to material evidence but not a right to compel pretrial examination of witnesses.

Thus, no substantial federal question is involved where the California Supreme Court declined to exercise its inherent rule-making power on the grounds that no federal right to such deposition mandated exercise of the power and, further, that such power would not otherwise be exercised in an area where the Legislature had spoken. This appeal should be dismissed because no substantial federal question is presented.

* * * * * *

III.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment is clearly not final, it is clear that no statute was found valid against a claim it was repugnant to the Constitution, and the questions upon which this cause depends are so insubstantial as not to need further argument, and appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of California.

Respectfully submitted,

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